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Ralph L. Daniels v. Gamma West Brachytherapy LLC and John K. Hayes, M.D. : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

RALPH L. DANIELS, Plaintiff/Appellant, v. GAMMA WEST BRACHYTHERAPY, L.L.C. & JOHN K. HAYES, M.D., Defendants/Appellees.	))))))))	BRIEF OF APPELLANT Appeal Case No. 20080201 Civil Case No. 03-0926947

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,

STATE OF UTAH, THE HONORABLE ROBIN W. REESE PRESIDING

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Pursuant to Utah Rule of Appellate Procedure 24(a), Appellant submits the following Appellate Brief.

Table of Contents

Table of Authorities

Cases

Statutes & Rules

JURISDICTION

The Utah Supreme Court has appellate jurisdiction pursuant to Utah Code Ann. §78A-3-102. The Supreme Court elected to retain jurisdiction as set forth in an order April 14, 2008.

This appeal is from a trial on the statute of limitations defense concerning the 'discovery rule' under the Utah Medical Malpractice Act. At the time of trial, the only defendants were GWB and Dr. Hayes, Appellees herein. Although named as defendants in the original complaint of December 1, 2003, the University of Utah and Salt Lake Regional had been dismissed by the time of this trial. The trial from which this appeal is taken was on the statute of limitations issue for claims against GWB and Dr. Hayes. However, there was absolutely no evidence connecting this brachytherapy (HDRB) procedure with any malpractice or negligence, or even that this procedure was causally related to the anterior abdominal wound breakdowns, the "injuries", which manifested during the critical time period (March through May of 2001) for 'discovery' purposes.

Instead, all evidence was that during this time Mr. Daniels was undergoing a procedure performed by the U of U known as EXBRT which was given *after* the HDRB, and given in relatively low doses over about 25 days. After about 2/3 of that procedure was completed, Mr. Daniels' old inguinal hernia scar started breaking down. Mr. Daniels was told this was not radiation related and so he returned for the last third of the EXBRT.

A few weeks after completion of the course of EXBRT on or about May 26, his other wounds (the surgical incision and the area around his colostomy bag) also broke down until he had one huge, open wound covering almost half his anterior abdomen.

Despite the fact that no mention was made of brachytherapy (aka here as HDRB) as a substantial factor in the onset of these injuries, the jury was instructed that if Mr. Daniels knew or should have known that he had been 'injured' and that his injury was caused by 'negligence', then the statute of limitations against defendants/appellees, GWB and Dr. Hayes, who performed the HDRB but had no hand in the EXBRT, had run.

ISSUES AND STANDARDS OF REVIEW

1. Whether the special verdict and jury instructions given by the trial court incorrectly reflected controlling statutory and case law interpreting the 'discovery rule'. Should the verdict and jury instructions have made particular reference to high dose rate brachytherapy (HDRB), the procedure performed on Mr. Daniels by Defendants/ Appellees herein, Gamma West Brachytherapy *dba* Gamma West Cancer Services (GWB) and John K. Hayes (Dr. Hayes)?[1]

Standard of Review: the applicability of a statute of limitations defense and in particular, the interpretation of the discovery rule, is a question of law, which is reviewed for correctness. *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990).

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[1] See Addendum Exhibit #1 (Trial transcript, R. 6265 p. 5:4-8 & 25; p. 6:1 to p. 8:6; p. 122:12 to p.123:17; R. 6265 p. 125:14 to p. 126:3; Mr. Daniels' proposed jury instructions, R. 5903-05, 5779-81 & 5782-85; proposed special verdict, R. 5790-93 [and brief in support thereof, R. 5794-5806]. R. 6267, p. 498:1 to p. 499:7). Trial court's instructions & verdict: R. 6061-64, & 6070. *A corollary issue regarding tolling would arise should this Court disagree that discovery of the cause-in-fact is a necessary condition precedent to 'discovery' of one's injury* (R. 6265, p. 7:3-7).

2. Was the trial court's admission of evidence that Mr. Daniels originally sued entities which were no longer parties to the action by the time the statute of limitations issue came to trial so confusing and prejudicial that it constituted reversible error?[2]

Standard of review: Evidentiary rulings are ordinarily reviewed for an abuse of discretion. *State v. Pena,* 869 P.2d 932, 938 (Utah 1994). However, in this case, embedded within the trial court's evidentiary ruling is a key question of law: whether the mere suspicion that there was negligence in *any* medical procedure, where there are two or more discrete procedures, is sufficient to constitute 'discovery', or whether a separate statute of limitations should be applied for each potential defendant, arising upon discovery of a possible relationship between the plaintiff's injuries and the putative defendant's procedure.

3. Did the trial court incorrectly exclude evidence of insurance offered to impeach under Rule 411, which specifically allows such evidence to show bias and control?[3]

Standard of review: The trial court's interpretation of statutes and rules is a question of law, reviewed for correctness. *Loporto v. Hoegemann*, 1999 UT App. 175, ¶5; 982 P.2d 586, 587.

Issues four, five, six and seven (*infra.*), were ruled upon before the bifurcated trial on the statute of limitations defense. As such, these issues were not addressed directly in the statute of limitations trial. However, they were determined by the trial court in fully

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[2] See Addendum, Ex. #2. Preserved at the trial court: R. 6264, p. 2:12-22; p. 66: 25 to p. 72, end; R. 6265 pps. 139-143; R. 6266 pps. 243-248.
[3] See Addendum Ex. #3. R. 5860-64; R. 6264 p. 22: 19 to p. 30:2; & R. 6022.

briefed, final motions. Issues four, five, six and seven are therefore presented to this Court for reversal and guidance on remand should Mr. Daniels prevail in the first issue.

4. Did the trial court improperly grant GWB's and Dr. Hayes' motion for partial summary judgment on Mr. Daniels' claim for punitive damages?[4]

Standard of Review: the granting of a motion for summary judgment presents a question of law, which is reviewed for correctness. *Mast v. Overson,* 971 P. 2d 928, 931 (Utah Ct. App. 1998).

5. Did the trial court improperly interpret Utah Rule of Civil Procedure 30(e) and 26(1)(e) in striking Mr. Daniels' expert radiation oncologist's supplementary opinions?[5]

Standard of review: The trial court's interpretation of statutes and rules in the judicial code is a question of law reviewed for correctness. *Loporto,* 982 P.2d at 587.

6. Did the trial court improperly grant a motion to strike Mr. Daniels' cause of action for breach of fiduciary duty as pleaded in his Second Amended Complaint?[6]

Standard of review: The trial court's interpretation of statutes and rules in the judicial code is a question of law reviewed for correctness. *Loporto,* 982 P.2d at 587.

7. Did the trial court improperly deny a motion to amend Mr. Daniels' [second] amended complaint to add a cause of action for fraudulent concealment?[7]

Standard of review: The trial court's interpretation of statutes and rules in the judicial code is a question of law reviewed for correctness. *Loporto,* 982 P.2d at 587.

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[4] See Addendum, Ex. #4: Preserved at the trial court. R. 6272 to 6501; & R. 5438-41.
[5] See Addendum, Ex. #5: R. 3486-3594; & affidavit of Alicia Blunt; R. 6483; Preserved at the trial court, R. 4299-01; R. 4299-4300 & 4680-81.
[6] See Addendum, Ex. #6 R. 5205-5218; Preserved at the trial court, R. 5458-60.
[7] See Addendum, Ex. #7 Preserved at the trial court, R. 5455-57, 5201-5204, 5199-5200.

DETERMINITIVE PROVISIONS*

* Due to the number and length of the statutes and rules determinative of the issues on appeal, all statutes and rules are attached in the addendum as Exhibit # 9. The order of the statutes and rules presented in the addendum generally follows the order of the issues presented for appeal in this brief. The medical malpractice statute on informed consent is set forth at the end of the list of determinative provisions. This statute relates to issues number six and seven regarding Mr. Daniels' causes of action for breach of fiduciary duty and fraudulent concealment.

STATEMENT OF THE CASE

Statement of facts relevant to the issues presented for review:

Ralph Daniels was diagnosed with a stage two rectal tumor on January 16, 2001 (R. 6489 & 6453; R. 6350-51). It was recommended by his surgeon, Dr. Steven Mintz, and Dr. Roger Hansen, a relatively inexperienced radiation oncologist and employee of GWB, that he undergo a procedure known as HDR[8] brachytherapy, ('HDRB'). The HDRB was to be done intra-operatively, should surgical excision of the colorectal tumor fail to completely remove the tumor, that is, should residual margins remain. Dr. Hansen had originally planned pre-operative radiation therapy (RT) to shrink the tumor if it was determined to be unresectable "if unresectable then plan pre-op RT" (R. 6490-91). This was acceptable treatment in 2001 for rectal tumors (6486-87). It was only later (R. 6351), when he decided to use HDRB.

[8] HDR refers to "high dose rate".

Mr. Daniels was not informed of the experimental nature of this procedure, the standard alternatives, nor of the risks of combining HDRB with EXBRT by anyone at GWB or by Dr. Mintz.[9] No risks of radiation burns were disclosed to Mr. Daniels, whether verbally or in written informed consent documents (R. 6406-12), although Dr. Hayes conceded it would be good to disclose such risks (R. 6428-29; R. 1573-77).

The informed consent documents did not mention these risks (R. 6475-80). Both Doctors Hayes and Hansen knew that besides HDRB, Mr. Daniels would receive EXBRT to the entire pelvis, to be administered by the U of U (R. 6462-63; R.6354).

Mr. Daniels' tumor was allegedly not completely removed, so the HDRB procedure was carried out by Drs. Hansen and Hayes. Catheters were placed into Mr. Daniels' abdominal cavity. Over three days 2,450 cGy of HDRB radiation was given. Mr. Daniels was discharged in late January with no apparent complications (R. 4173-74).

Within a few weeks of completing the HDRB, Mr. Daniels underwent EXBRT to the entire pelvis (R. 4173-74) in the amount of 4,500 cGy. However, since the EXBRT was given over several weeks instead of three days, the biological equivalent dose (BED) of both treatments combined was greatly in excess of that usually given for similar tumors (R. 6530-51). As admitted in "Principles and Practices of Radiation Oncology", a text used by Dr. Hayes, and in Dr. Hansen's deposition, the combined amount of radiation Mr. Daniels received was *greatly in excess* of that usually and safely given. Mr.

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[9] External beam radiation treatment, (EXBRT) was standard treatment for rectal tumors in January of 2001 (R. 6484, 6486-87). EXBRT was performed on Mr. Daniels by the University of Utah (hereinafter 'U of U'), Department of Radiation Oncology under the direction of Chief, Gregory Patton, M.D (R. 6266 p. 408:19 to 409:8).

Daniels received the BED of 90,500 cGy of radiation (R. 1546-47) when "radiation traditionally stops at 5,040 cGy" (R. 6351). 90,500 cGy (90.5 Gy) is the BED of 2450 HDRB plus 4500 EXBRT, a dose toxic to normal tissue (R.6433-34; 6436; R. 6366-67).

On or about March 16, 2001 Mr. Daniels' 40 year old inguinal hernia scar dehisced.[10] He saw his primary care physician, Dr. Wain Allen who *never* told Mr. Daniels the dehiscence might be a result of the HDRB (R. 6266 p. 326:13 to p. 328:11).

Dr. Allen directed Mr. Daniels back to the U of U Department of Radiation Oncology. There, Mr. Daniels was told by Dr. Watson, an assistant to Dr. Patton, that the cause of the hernia breakdown was infection (R. 6266 p. 344:25 to p. 346:8).

Mr. Daniels then saw his surgeon, Dr. Mintz, who testified in deposition that he did *not* tell Mr. Daniels his anterior abdominal wound breakdown was from radiation until *after* Mr. Daniels was transferred to the U of U Burn Unit in June of 2001. Dr. Mintz later changed his deposition testimony in trial. Nevertheless, at no time prior to fall of 2001 did Dr. Mintz tell Mr. Daniels that the *HDRB* might have caused these abdominal wound injuries (R. 6265 p. 202: 23 to p. 207:4 & p. 213:12 to p. 215:15).

On his doctors' advice, Mr. Daniels returned for a second course of EXBRT from April 17th to April 26th 2001 (R. 6266, p. 408:19 to p. 409:8; R. 6105-07, Defendants' Trial Ex. #12). Mr. Daniels met with Dr. Patton, whose note of May 2, 2001 confirms Mr. Daniels' complaint of left hip pain; however, his note states nothing about radiation injuries (R. 5806; R. 6105-06; R. 6266, p. 263:12-17; R. 6266 p. 403:19 to p. 405:23).

[10] Necrosed and broke apart, R. 6105-06; Defendants' Trial Exhibit #6.

On the evening of May 25, 2001 Mr. Daniels' colostomy and midline incision began to break apart in a fashion similar to the dehiscence of the old inguinal hernia scar. He went to see Dr. Mintz the next morning and was admitted to Salt Lake Regional Medical Center ('SLR'). Over the next few days his midline incision, colostomy incision, and old inguinal hernia scar wound coalesced into one huge wound, which became infected (R. 6266, p. 311:20 to p. 312:2; R. 6105-06: Plaintiff's Trial Ex. #1-3).

On June 6, 2001 Mr. Daniels was transferred to the U of U where further debriding and skin grafts were performed by Dr. Jeffery Saffle, head of the Burn Unit (R. 4192). It was not until months after this transfer to the Burn unit that Mr. Daniels suspected that HDRB may have been a cause of his injuries (R. 4279-80; R. 6266 pps 263, 266-268, 270, 274-275, & R. 6266, p. 430:20 to p. 431:9).

According to Mr. Daniels' radiation oncology expert, Dr. Sydney Kadish (University of Massachusetts), Mr. Daniels "was over- radiated [sic] and developed a whole bunch of long term serious complications"; he suffered "long-term toxicities" including a rectovesical fistulae, "necrosis in the rectal stump", and uretral stenosis leading to kidney malfunction. The HDRB also "burned a hole in the back of the bladder" and was given in a "dose which destroys [normal] tissue," (R. 1526-43).

It appears that Mr. Daniels' cancer has not recurred. However, in addition to initial *anterior* abdominal wound breakdowns which required cutting away some of the burnt tissue and multiple skin grafts, over the next several years Mr. Daniels underwent multiple surgeries and treatments as a result of *intra*-abdominal radiation damage. These included: ilieostomy, ileoconduit, multiple debridements of necrotic tissue from radiation

burns, surgery for blockages, nephrostomies for kidney malfunction due to burned ureter(s), and dialysis (R. 6456-57). Mr. Daniels also faces potential kidney transplant due to his burned ureter(s) (R. 6483 & 6485), has multiple abdominal hernias from the cumulative total of the radiation therapy (R. 6491), and suffers constant granulating tissue draining from a hole where his anus used to be (R. 6337-45 & 6347-48).

On or about June 13, 2001, *Mrs.* Daniels met with Dr. Patton to ask about the cause of her husband's abdominal wound breakdown. She thought it might be related to the EXBRT. Dr. Patton told her that neither EXBRT nor HDRB could have caused it (R. 6266, p. 405:13-23; R. 6105-06: Plaintiff's Trial Ex. # 5).

Sometime in the spring of 2002, Dr. Saffle was talking about Mr. Daniels to resident physicians in the Burn Unit and said "he had brachytherapy and had the Holy Jesus burned out of him." (R. 1552:10-15). Until hearing this statement, Mr. Daniels had never thought that the *HDRB* administered by GWB and Dr. Hayes, as opposed to or in addition to the *EXBRT* administered by the U of U, might be the cause of his injuries (R. 6266 p. 422:24 to p. 423:3; R. 4173-75 and R. 4279-4280).

Dr. Lawrence T. Goodnough, Stanford, Mr. Daniels' expert oncologist, testified that the administration of HDRB was completely experimental in this situation (R.6488). Defense expert Dr. Schwartz testified there were no clinical trials concerning whether HDRB increased local control [of the tumor] or [long-term] survival (R. 6453).

"Adjuvant treatment should only be given in the context of clinical trials"[11] (R.6487-88). Dr. Schwartz admitted that local failure (tumor re-growth) in these type cases is only 15%, meaning an 85% success rate (R. 6451-52), (See also 6487-88). There is no evidence that the HDRB increases these odds of long-term survival.

Nature of the proceedings and disposition in the trial court

This is a medical malpractice action initially brought against GWB, Dr. Hayes, the U of U and SLR. A notice of intent was filed by Mr. Daniels' prior attorney against GWB, Dr. Hayes, the U of U and SLR. In late May of 2003, after the prelitigation hearing, and before the complaint was filed, Mr. Daniels' original attorney withdrew.

Several months later, Mr. Daniels hired his present counsel. The original, unverified[12] complaint was filed in this case on December 1, 2003, naming all respondents in the notice of intent as defendants (R. 1-8). After extensive discovery and motions to dismiss, both the U of U and SLR were dismissed (R. 605-606 & 1294-95). There was no evidence presented at the statute of limitations trial regarding negligence by either the U of U or SLR. [13] (R. 6264, 6265, 6266 & 6267).

After expert disclosures and within 30 days of Mr. Daniels' radiation oncology expert Dr. Kadish' second deposition, Dr. Kadish submitted corrections to his transcript

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[11] Perez and Brady, Principles and Practice of Radiation Oncology. (Lippincott, Williams and Wilkins, editions 1987, 1992, 1997 and 2004), used by Dr Hayes (R. 6428-29).

[12] Utah is a notice pleading state (See Utah R. Civ. P. 8(a)(1,2), and does not require that a complaint be verified, that is where the plaintiff signs under oath, verifying the allegations. This is important when discussing the second issue on appeal, the trial court's admission of evidence that Mr. Daniels sued the U of U and SLR, in his original, unverified, complaint. The trial court also allowed portions of that original, unverified complaint to be read to the jury (R. 6266, p. 243:11 to p. 248:22).

[13] By trial in 2008, these two originally named defendants had been dismissed (R. 6484).

(R. 3485, 3582-83). Mr. Daniels' also supplemented his Rule 26 disclosures with additional, foundational opinions from Dr. Kadish (R. 2303-09).

Defendants moved to strike Dr. Kadish's corrections to his deposition testimony and Mr. Daniels' supplementation to his Rule 26 disclosures, per Rule 26(e)(1). The trial court granted the motion to strike the deposition changes *en toto* (R. 4299-4301). The trial court granted the motion to strike supplementary opinions set forth in the Rule 26 disclosures, in part, striking paragraph 1 and 2 which included testimony that the HDRB treatment was a 'substantial and significant risk of injury' to Mr. Daniels.[14]

The trial court granted leave to file an [first] amended complaint (R. 4645-47). Neither the U of U nor SLR were named as defendants in the [first] amended complaint; however, based upon additional discovery, the [first] amended complaint contained causes of action for gross negligence, lack of informed consent, breach of fiduciary duty and a prayer for punitive damages (R. 4247-55).

GWB and Dr. Hayes moved for partial summary judgment on the issue of punitive damages. The trial court struck (per defense request) exhibits 4, 6, 8, 11, 12, 14, 17, and 19 (5069). Partial summary judgment on the claim for punitive damages was ultimately granted (R. 5429 & 5452-53).

Briefly, the factual evidence in opposition to the motion for partial summary judgment was that Mr. Daniels had a stage II (R. 6489) (as opposed to a potential stage IV) rectal tumor which had not metastasized and did not even affect the lymph nodes. A

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[14] R. 4680-81. Although defendants were ordered to prepare an order based on this minute order, there appears to be no order in the court's original file.

preoperative *pelvic* CT scan (never located) was taken which allegedly showed the tumor (R. 4870). This application of HDRB had rarely, if ever, been used by Dr. Hayes (R. 1567-77; R. 1568: 5-10), and never by Dr. Hansen (R. 6469:8 to 6470:11-17). HDRB to a residual colorectal tumor had never been seen before by Dr. Bossart, Mr. Daniels' subsequent treating colorectal surgeon, who used the standard pre-operative RT (R. 6445: 1-16). Dr. Patton had never seen HDRB done in this type of a situation and [at the time of his deposition] would advise against it (R. 6320-24).

The trial court struck Mr. Daniels' cause of action for breach of fiduciary duty. In the same memorandum opinion, the court denied the motion to strike Mr. Daniels' claim for gross negligence, yet did not allow his claim for punitive damages (R. 5438-41). (Evidence filed in support of Mr. Daniels' claim for punitive damages was not marked as part of the original record; pursuant to an order of this Court on August 23, 2008, it has been added as numbers 6272 through 6501 inclusive).[15]

The trial court stated in its memorandum decision that:

> ...defendants' Motion to Dismiss the Plaintiff's Claim for Punitive Damages was made moot by the Court's grant of Partial Summary Judgment in favor of the defendants on that same issue. The decision announced at that hearing disposed of all of the plaintiff's claims for punitive damages on all causes of action in the Amended Complaint."[16]

The trial court then ruled that:

> A claim for gross medical negligence does not necessarily support a claim for punitive damages. A claim for punitive damages requires allegations that the defendants' behavior was willful and malicious, intentionally fraudulent, or manifests *a knowing and reckless disregard toward the rights of others.* (Emphasis added;

[15] Unmarked Order attached to Addendum, as Ex. #11.
[16] Ruling, *Id.* at page 1.

> citations omitted.) In order to allege gross medical negligence, however, the plaintiff must allege carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." (Citation omitted.) In contrast to a claim for punitive damages, a claim for gross medical negligence does not require allegation of willful or intentional misconduct. (Citation omitted.) Therefore, it is possible for plaintiff to state a claim for gross medical negligence without also stating a claim for punitive damages.
>
> For the foregoing reasons, the Court holds that plaintiff has stated a claim for gross medical negligence, and so the Defendants' motion is denied. However, nothing in this ruling would permit the plaintiff to revive his claim for punitive damages based on the claim of gross medical negligence.[17]

Mr. Daniels moved for leave to file a second amended complaint which contained causes of action against GWB for [simple] medical negligence, lack of informed consent and gross negligence. Leave to file was granted (R. 5547-48 & 5603-05). He then moved to amend the complaint to add a cause of action for fraudulent concealment (R. 5201-04, 5199-5200). This motion was denied by the trial court (R. 5455-57).

GWB and Dr. Hayes moved for summary judgment on the statute of limitations issue. The court denied the motion, (R. 5073-76). GWB and Dr. Hayes then moved for a bifurcated trial on the statute of limitations issue, which motion was granted. The statute of limitations issue was tried January 15-17, 2008 before a jury. GWB and Dr. Hayes were the only remaining defendants against whom this issue was tried.

A motion in limine to exclude evidence of insurance was brought by GWB and Dr. Hayes. Mr. Daniels opposed the motion, requesting that the trial court allow voir dire questions in the form of either a questionnaire, or oral questioning regarding whether any potential jurors had experience in risk management or claims adjusting (R. 5860-64; 6022). Mr. Daniels asked the trial court to allow impeachment evidence that Dr. Mintz,

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[17] Ruling, *Id.* at pages 2-3.

Mr. Daniels' surgeon who had changed his testimony on the key issue of *when* he told Mr. Daniels that radiation was a cause of his anterior abdominal wound breakdown, was insured by UMIA, the same carrier for GWB and Dr. Hayes. Mr. Daniels was precluded from asking the venire panel questions about insurance claims adjusting. The trial court disallowed Mr. Daniels from presenting impeachment evidence that UMIA insured the witness physicians, despite the fact that Dr. Mintz directly contradicted his deposition testimony (R. 6020-24; 6265, p. 202:23 to p. 207:4 & p. 213:12 to p. 215:15).

There was absolutely no evidence presented that anyone, let alone Mr. Daniels, had discovered or had reason to discover that the *HDRB* recommended and administered by GWB through its agents and employees was a possible, substantial, cause of Mr. Daniels' anterior abdominal wound breakdowns until months after May 6, 2001. Dr. Watson, the U of U radiation oncologist, Dr. Mintz the tumor surgeon, and Dr. Allen, Mr. Daniels' primary care physician, all testified that they had not considered *brachytherapy (HDRB)* as a potential cause of his abdominal injuries and therefore did not relay that to Mr. Daniels (R. 6265 p. 178:22 to p. 179:4; R. 6265, p. 205:22-25; R. 6266, p. 283:21 to p. 284:1; R. 6266 p. 322:21-25; R. 6266, p. 335:7-11; R. 6266, p. 345:12-16; R. 6266, p. 353:20-14; R. 6266, p. 422:24 to p. 423:3; R. 6266, p. 424).

During the trial GWB and Dr. Hayes were allowed to read to the jury allegations contained in the original, unverified complaint regarding the U of U and SLR and to ask Mr. Daniels to admit that he had originally sued these dismissed defendants (R. 6266, p. 243:11 to p. 248:22). This evidence was offered by defendants as impeachment.

All the evidence regarding therapeutic radiation in this trial was about the EXBRT, which radiation, although perhaps a cause in fact of some of Mr. Daniels' injuries, since it was given *in addition* to the HDRB, was not given in breach of the standard of care and *was* given with the proper informed consent (R. 3509 p. 47:2- 48:4).

The defense presented no evidence regarding GWB's duties in administering HDRB, the standard of care for GWB's and Dr. Hayes' conduct, compliance with that standard, or any argument that HDRB did not cause the injuries. In fact, all testimony was that nobody, even the professional health-care providers who testified, initially considered[18] that HDRB was a cause of Mr. Daniels' anterior abdominal injuries.

Mr. Daniels submitted a special verdict with supporting jury instructions for the jury to determine when Mr. Daniels discovered or should have discovered that it was the *HDRB procedure in particular*, which was a cause of his injuries.[19] The trial court gave instructions and a verdict form stating that Mr. Daniels need only have discovered or should have discovered that he was injured, and that this injury "was or may have been attributable to negligence" without identifying any particular procedure, cause-in-fact or defendant (R. 6070 and 6061-64). The trial court instructed the jury that they needed to determine when Mr. Daniels suspected negligence; however:

> [you] have not been presented with any evidence regarding whether the Defendants' action[s] were negligent. Therefore, that issue is not before you at this time. But you must still decide if the plaintiff was or should have been aware of sufficient facts to conclude that he may have had a claim for negligence (R. 6064).

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[18] Months later Dr. Mintz told Mr. Daniels the courts would have to add up the radiation given by GWB and the U of U to determine who was at fault (R. 6265, p. 206:6-16).

[19] Note, the May 14, 2001 date in the submitted verdict form was changed to May 6, 2001 in the verdict form given to the jury, after the Court's ruling on the motion in limine.

Although the verdict asks the jury to determine whether Mr. Daniels knew of his injury, and whether his injury was a result of negligence, and although jury instructions defining "cause in fact" and "legal cause" as well as an instruction on the "definition of negligence" were offered (R. 5903-05), the jury received no such instructions.

In the trial the jury determined Mr. Daniels [knew] or "should have reasonably known of an injury and that his injury was or may have been attributable to negligence,"[20] prior to May 6, 2001 which was the date agreed-upon that 'discovery' before that date would be too late, that is, beyond the statute of limitations.

SUMMARY OF ARGUMENTS

1. The trial court erred as a matter of law by not instructing the jury on 'cause in fact', the definition of 'legal injury' and the elements of negligence, and because it did not require the jury to determine whether Mr. Daniels discovered or should have discovered that the *negligent administration of the HDRB procedure* was or may have been a cause of his injuries.

A corollary issue to number one regarding tolling of the discovery statute would be relevant and is contingently submitted as part of this appeal if this Court determines that it is *not* necessary for a plaintiff to have discovered the cause in fact in order to

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[20] R. 6070 & 6022. The verdict asks the jury to determine whether Mr. Daniels knew or should have known of the injury and that the injury was caused by negligence on or before May 6, 2001. This date was determined by the court in an order on a defense motion in limine based upon filing dates of the complaint when the certificate of compliance was served by DOPL and calculation of the remaining time within which to file. Thus if the jury found Mr. Daniels' discovery of the injury and negligence was before that date, his complaint was deemed filed too late as a matter of law (R. 6022, #6).

constitute 'discovery'. (This issue is discussed more fully *infra.*, under ARGUMENT).

2. The trial court abused its discretion when it admitted into evidence that Mr. Daniels originally sued the U of U and SLR and the allegations of the original, unverified complaint concerning Mr. Daniels' claims against these former defendants.

These evidentiary admissions were more prejudicial than probative and therefore should have been excluded under Utah Rule of Evidence 403, because they confused the jury as to which health care provider's actions Mr. Daniels needed to suspect were a possible negligent cause of his injuries, ultimately leading to a verdict that was most probably based upon a finding that Mr. Daniels 'discovered' 'negligence' by the U of U's EXBRT procedure as opposed to any negligence as a result of GWB's HDRB procedure.

3. The trial court incorrectly interpreted Utah Rule of Evidence 411 by granting GWB and Dr. Hayes' Motion in Limine to Preclude Evidence of Insurance because the evidence of insurance was being offered to prove bias and possibly control of the insured by the insurer, and not to prove negligence.

Mr. Daniels should have been allowed to reference "insurance" by asking in voir dire if anyone worked for insurance companies or in risk management, and eliciting impeachment testimony from Dr. Mintz and Dr. Allen, both insured by UMIA, who also insured Dr. Hayes and GWB. The impeachment testimony should have been admitted because both physicians directly contradicted their prior statements, regarding the key fact of *whether* or *when* they told Mr. Daniels that radiation [in general] was a cause of his anterior abdominal wound breakdown (injuries), without explanation.

4. The trial court erred in granting GWB's and Dr. Hayes' Motion for Partial Summary Judgment on the issue of punitive damages. Mr. Daniels submitted substantial evidence showing a genuine issue of material fact regarding whether defendants' conduct in failing to inform Mr. Daniels of the high risks of combining HDRB and EXBRT and applying HDRB in an experimental manner was 'conduct which manifested a knowing and reckless indifference toward, and a disregard of Mr. Daniels' rights.' Furthermore, the trial court should not have struck the additional exhibits under Utah R. Civ. P.12 (f).

5. The trial court incorrectly struck Plaintiff's expert radiation oncologist, Dr. Kadish's additional opinions disclosed in written changes to deposition testimony and in a supplemental Rule 26(e)(1) disclosure. Since these opinions were added as corrections to his deposition testimony, and/or set forth in a supplementary disclosure per Utah R. Civ. P. 26 (1)(e), they should have been allowed.

6. The trial court incorrectly stuck Mr. Daniels' cause of action for breach of fiduciary duty because such a relationship has been recognized by this Court in the physician-patient context, and such a cause of action is not merely duplicative of a statutory cause of action for lack of informed consent under Utah Code §78-14-5, (2001).

7. The trial court incorrectly refused to allow an amendment to Plaintiff's Second Amended Complaint to add a cause of action for fraudulent concealment where the cause of action was based upon the same basic set of facts previously pleaded and where such a cause of action has been recognized in the physician-patient relationship.

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ARGUMENTS

1. The trial court should have instructed the jury on 'cause-in-fact', 'legal injury' and 'negligence', and should have required the jury to determine whether Mr. Daniels discovered or should have discovered that the negligent administration of the HDRB procedure in particular, as opposed to negligence in general was a cause of his injury(ies).

The trial court incorrectly applied case law in deciding which instructions and special verdict to give the jury. The elements of the tort of negligence include duty, breach and damages. One cannot know of any breach if one is unaware of the duty required and the facts upon which the breach is based, or whose medical treatment breached that duty (i.e. GWB's HDRB as opposed to the U of U's EXBRT).

Defense counsel argued that the jury should be instructed that Mr. Daniels had only to discover that *negligence in general* (as opposed to the negligent administration of HDRB radiation *in particular*) was or might be a cause of his injuries (R. 6265 p. 5:26 to p. 8:18 & p. 122:4-9).

Mr. Daniels argued that discovery of the facts upon which the alleged malpractice claim is based was necessary prior to his 'discovery' of those same facts. Negligence was pleaded as the first cause of action in the Second Amended Complaint, along with gross negligence and lack of informed consent. Since the trial court struck the cause of action for breach of fiduciary duty (R. 5458-59) and entered partial summary judgment re: punitive damages (R. 5438-40), neither a cause of action for breach of fiduciary duty, nor a prayer for punitive damages was included in the Second Amended Complaint.

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It was the Second Amended Complaint which governed the statute of limitations trial. Mr. Daniels submitted jury instructions on 'cause in fact', 'legal cause' and 'negligence', (all of which were rejected by the trial court).[21] The instructions and verdict form given to the jury did not comport with Utah law.[22]

A. Under Utah law, Mr. Daniels could not have "discovered" his legal injury until he knew or should have known that it was the HDRB, rather than therapeutic radiation in general, that caused his injuries.

"[t]he term discovery of "injury" in §78B-3-404 means discovery of injury *and the negligence which resulted in the injury*". *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979) (Emphasis added).

> [T]he limitations period is tolled to the point at which the plaintiff receives reliable and precise information sufficient to give reasonable assurance that the defendant is in fact the tortfeasor...the discovery rule applies to situations in which the plaintiff did not know the identity of the tortfeasor until a later date.

Robinson v. Morrow, 99 P.3d 341 (Utah Ct. App. 2004).

Robinson involved the circulation of a libelous letter in which Robinson was accused of child molestation. Initially Robison suspected it was authored by his sister Morrow, and took various steps to ascertain whether she was in fact the author. *Id.*, at 342-343. However, it wasn't until Morrow confessed to Smith, who informed Robinson of the confession, that he took legal action against Morrow. *Id.*, at 343.

In applying the "discovery rule" to his claims for libel, intentional infliction of emotional distress and invasion of privacy, the appellate court reasoned:

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[21] See note 1, supra.
[22] See R. 6061-64 & 6070.

> In this case, we conclude the statute of limitations was tolled until October 2000 when Smith informed Robinson that Morrow had allegedly confessed to writing the letter. Smith's information essentially provided a breakthrough in Robinson's investigation, *giving him a reliable and precise factual basis for his suspicions.* Despite alleged efforts at concealment, Robinson knew or reasonably should have known at this point that Morrow was likely involved with the letter or, at the least, that Morrow would probably have discoverable information. *As a result, Robinson possessed all of the facts necessary for his cause of action, and, accordingly, for the statutes of limitations to begin running.*
> *Morrow, Id.*, at p. 347. (Emphasis added).

However, an earlier Utah decision in a medical malpractice case held that the identity of the tortfeasor need not be known in order to start the running of the statue of limitations. *McDougal v. Weed,* 945 P.2d 175 (Utah Ct. App.1997) held that: "The medical malpractice statute of limitations is tied only to the discovery of the plaintiff's legal injury and not to the discovery of the tortfeasor's identity." *Id.*, at 178.

McDougal dealt with a patient who claimed injury as a result of treatment performed by an ER physician at Cottonwood Hospital. McDougal initially filed a notice of intent against the hospital and the wrong ER physician for the ER treatment. It wasn't until months later, at the prelitigation hearing and beyond the two year statute, when he realized it was in fact *another* ER physician who had rendered the treatment. *Id.*, at 176.

The distinguishing point between *McDougal* and the case at bar is that in Mr. Daniels' case we have two different types of therapeutic radiation that were administered by two different entities at two different times. *McDougal* cited this Court's decision in *Jensen v. IHC Hosp.* 944 P.2d 327, 337 (Utah 1997) (reversed and remanded in part on other grounds), for the proposition that the statute of limitations begins to run only when the "[plaintiff discovers or should have reasonably discovered the] underlying injury *and*

its origins in medical malpractice." *McDougal,* 945 P.2d at 177 (emphasis added). "Origin" is defined as "a point of origination, source." Synonyms are "derivation" and "source".[23] Thus, although *McDougal* stood for the proposition that the *identity* of the tortfeasor need not be known (which appears contrary to the holding in *Robinson*), clearly the procedure upon which the malpractice claim was based, or the fact that it was from a shoulder procedure at the emergency department of the hospital, i.e., the cause in fact, was undisputedly known by the plaintiff.

Therefore jury instructions and a special verdict that required the jury to determine if Mr. Daniels discovered or should have reasonably discovered that the negligent administration of the *HDRB, the brachytherapy radiation,* was a cause of his injuries would have been appropriate. This was the origin of his injuries at issue, and it was *this* discovery that triggered the 'discovery of legal injury' necessary to begin the running of the two year statute of limitations as to Defendants/Appellees GWB and Dr. Hayes. The trial court's failure to so instruct the jury was incorrect as a matter of law.[24]

Plaintiff must be aware of the elements of a cause of action for negligence in order to 'discover" his 'legal injury' and start the running of the statute of limitations. The first

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[23] Webster's II New College Dictionary, Houghton Mifflin Company, 2001, page 773.

[24] See also *Collins v. Wilson* 1999 UT 56 ¶ 18; 984 P.2d 960, 966 which affirmed a trial court grant of summary judgment on a discovery of injury issue since the plaintiff knew and admitted that he was aware of a possible connection between defendant's surgery and his injury. "On cross-examination, Collins admitted they had suspicions over two years before they commenced this lawsuit *that something had gone wrong in Dr. Wilson's surgery.*" (Emphasis added). *Collins*, 984 P.2d at 966. In contrast, the undisputed facts in this case show that Mr. Daniels did not suspect the HDRB as a cause of his injury until well after May 6, 2001, the trigger date for the statute of limitations.

cause of action in the Second Amended Complaint is for [general] medical negligence; it is incongruous to think that the statute of limitations should begin to run when a plaintiff is unaware of facts supporting each of the elements of a cause of action for negligence. A cause of action for negligence has these elements:

> ...(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the [a] proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.

Hunsaker v. State, 870 P.2d 893, 897 (Utah, 1993).

B. Cases decided under the Federal Tort Claims Act (FTCA) support a similar interpretation of "discovery".

The Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401(b), bars any tort claim against the United States unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 'Accrual' is comparable to 'discovery' under Utah Law.

The leading Federal Tort Claims Act case construing the date of accrual in a medical malpractice context is *United States v. Kubrick,* 444 U.S. 111, 100 S. Ct. 352, (1979). The plaintiff in that case developed a ringing sensation in his ears, along with some loss of hearing, six weeks after being treated with neomycin for an infection in his thigh bone. *Id.* at 113-14, 100 S. Ct. 352. An ear specialist who had obtained plaintiff's hospital records told him that the loss of hearing was due to the neomycin treatment administered at the VA Hospital. *Id.* at 114, 100 S. Ct. 352. Despite this knowledge, the plaintiff failed to file a notice of claim within two years after being so advised. *Id.* at 115, 100 S. Ct. 352. The Supreme Court held that the cause of action accrued when the

plaintiff learned that the treatment with neomycin was the cause of his injury, even though he was not advised that this treatment was a departure from prevailing medical standards. *Id.* at 123-24, 100 S. Ct. 352. Once Kubrick was "aware of his injury *and its probable cause*," his cause of action accrued and he had two years to file an administrative complaint. *Id.* at 118, 100 S. Ct. 352. Importantly, the plaintiff in *Kubrick* was not charged with discovering his injury when he noticed the hearing loss; instead the statute of limitations period was triggered later, when the ear doctor connected the loss to the drug treatment. *Kubrick* has been followed by the First, Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeal.

'Kansas' "fact of injury" standard postpones the running of the limitations period until the time the plaintiff is able to determine that her injury may be *caused by some act of the defendant." Benne v. Int'l Bus. Mach. Corp.,* 87 F.3d 419, 427 (10th Cir.1996). *Bradley v. Val-Mejias* 379 F.3d 892, 898 (10th Cir. 2004). The Third Circuit Court of Appeals ruled similarly in *Green v. U.S.* 180 Fed.Appx. 310, 312-313 (3rd. Cir. 2006).

A Nebraska District Court cites similar rulings in the eighth and eleventh circuits: *Aziz ex rel. Azizi v. U.S.* 338 F.Supp.2d 1057, 1061 (D.Neb.,2004), citing *Garza v. U.S. Bureau of Prisons,* 284 F.3d 930, 934 (8th Cir. 2002), quoting *Diaz v. United States,* 165 F.3d 1337, 1340 (11th Cir.1999).

A Texas Eighth Circuit Court of Appeals decision holds that one must know *who* has inflicted his injury: *T.L. ex rel. Ingram v. U.S.* 443 F.3d 956, 961-962 (8th Cir. 2006).

A Florida Eleventh Circuit Court of Appeals decision discusses *Kubrick, supra.*

> In certain situations, such as medical malpractice, the claim may accrue at a later date. The rule for medical malpractice claims is that they accrue when the plaintiff knows of both the injury *and its cause*. (Citation omitted)..."Thus, a medical malpractice claim under the FTCA accrues when the plaintiff is, or in the exercise of reasonable diligence should be, aware of both her injury *and its connection with some act of the defendant."* (Citation omitted).

Diaz v. U.S. 165 F.3d 1337, 1339, (11th Cir., 1999). (Emphasis added).

The First Circuit Court of Appeals (Mass.) requires knowledge of cause in fact, see *Cascone v. U.S.* 370 F.3d 95, 104 (1st Cir. 2004). (See also Oklahoma and Vermont in accord, *Wilson v. U.S.* 2006 WL 1520776 *3 (E.D.Okla.) & *Neuenswander v. U.S.* 422 F.Supp.2d 425, 433 (D. Vt. 2006).

> C. Jurisdictions outside Utah that have adopted the discovery rule or have statutes similar to the Utah Medical Malpractice Statute mandate discovery of the cause in fact for a plaintiff to have 'discovered' his injury in medical malpractice cases.

When there is no definitive statement on an issue, our courts often look to other jurisdictions for guidance. *Retherford v. AT & T Communs.*, 844 P.2d 949, 972-73 (Utah 1992). A majority of the state jurisdictions outside of Utah with statutes similar to §78B-3-404, b(1), or which have adopted the "discovery rule" through case law, have holdings consistent with the proposition that one must have knowledge of the cause in fact before "discovery" can occur in a medical malpractice context.

A California Supreme Court case distinguished knowledge of the identity of a particular defendant (not a required element) and knowledge of the mechanism of injury (which is an element of any tort) in a case involving two claims: one a medical malpractice case, the other a products liability case. The Court held that plaintiff is not deemed to have discovered her product liability cause of action until she discovers her

injury resulted from a defective product. *Fox v. Ethicon Endo-Surgery, Inc.* 110 P.3d 914, 923 (Cal., 2005).

The New Jersey Supreme Court holds that a statute of limitations in a medical malpractice claim can run at different times against different defendants: *Gallagher v. Burdette-Tomlin Memorial Hosp.* 747 A.2d 262, 265 (N.J. 2000). An earlier New Jersey Supreme Court case with facts similar to the case at bar found that the Plaintiff's discovery of her cause of action was tolled until she had reason to connect her radiation injuries with the treatment of a *particular* defendant's procedure. See *Lopez v. Swyer* 300 A.2d 563, 565, 567-68 (N.J. 1973). Later, this Court held that discovery must include two key elements, injury and fault. In some cases "fault is not implicit in injury". The Court referred to *Lopez, Id.,* a case with facts similar to Mr. Daniels' situation:

> "...plaintiff had suffered burns and endured a great deal of pain from radiation therapy administered as partial treatment by defendants. After a considerable period of suffering, she sought assistance from another doctor. She later overheard a doctor who was examining her in the hospital say to other doctors who were present, "And there you see, gentlemen, what happens when the radiologist puts a patient on the table and goes out and has a cup of coffee." (Citation omitted). Plaintiff filed suit within seven months of this specific revelation but well after two years of defendant's last treatment. The Court determined that the suit was timely, concluding that it would be inequitable to deny an injured person the opportunity to press a claim when she was unaware that her injury was occasioned by the fault of another. [FN1]...
>
> *However, her second physician did not for months arouse her suspicions of past malpractice; he gave no intimation that something was medically awry in the plaintiff's previous professional care or that the reasons for the physical difficulties she was experiencing might be attributable to faulty medical treatment of her former physician. Revelation of such matters did not occur until May 1974.*

Lynch v. Rubacky 424 A.2d 1169, 1171-1175 (N.J. 1981).

The most recent New Jersey Supreme Court case states the rule succinctly:

[W]hen a plaintiff knows of an injury and that the injury is due to the fault of another, he or she has a duty to act." (Citation omitted). However, when that plaintiff reasonably remains unaware that an additional third party also may be at fault, "the accrual clock does not begin ticking against the third party until the plaintiff has evidence that reveals [the third party's] possible complicity." (Citation omitted).

Guichardo v. Rubinfeld 826 A.2d 700, 704-705 (N.J. 2003).

The Arizona Supreme Court requires knowledge of cause-in-fact for 'discovery':

"...it is not enough that a plaintiff comprehends a "what"; there must also be reason to connect the "what" to a particular "who" ... *Walk v. Ring* 44 P.3d 990, 996 (Ariz. 2002).

The Kentucky Supreme Court requires knowledge of specific wrongful conduct:

" [the discovery] rule entails knowledge that a plaintiff has a basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged; one must know: (1) he has been wronged; *and, (2) by whom* the wrong has been committed...

Wiseman v. Alliant Hospitals, Inc. 37 S.W.3d 709, 712 (Ky., 2000). [Emphasis added]

The Iowa Supreme Court also requires discovery of causation. See *Rathje v. Mercy Hosp.* 745 N.W.2d 443, 458 (Iowa 2008).

The Ohio Supreme Court citing *Foil v. Ballinger* (Utah 1979), 601 P.2d 144, 147, requires identification of a "specific professional medical service". See *Hershberger v. Akron City Hosp.* 516 N.E.2d 204, 208 (Ohio, 1987). See also, *Siedschlag v. U.S.*, 171 F.Supp.2d 716, 718-719 (S.D. Ohio 2001). The Nevada Supreme Court, also cites *Foil, Id.,* and requires knowledge of all the essential elements of a malpractice cause of action. See *Massey v. Litton* 99 Nev. 723, 669 P.2d 248, 250-252 (Nev. 1983).

The Michigan Supreme Court requires identification of a causal connection:

Some illnesses and injuries may defy even a possible diagnosis until a test, or a battery of tests, can limit the possibilities. In such a case, it would be unfair

> to deem the plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission. ...
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> whether a "plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury." [Citation omitted)

Solowy v. Oakwood Hosp. Corp. 561 N.W.2d 843, 848 (Mich. 1997).

The Oregon Supreme Court is likewise in accord. See *Greene v. Legacy Emanuel Hosp. and Health Care Center* 60 P.3d 535, 539-40(OR. 2002).

Massachusetts has adopted the 'discovery rule' requiring knowledge of the 'critical facts of the injury and their connection with the defendant. See *Malapanis v. Shirazi* 487 N.E.2d 533, 536-538 (Mass.App.1986).

The District of Columbia has adopted the discovery rule, requiring some knowledge of cause in fact. See *Hardi v. Mezzanotte* 818 A.2d 974, 979 (D.C. 2003).

Tennessee requires discovery of the mechanism of breach. *Green v. Sacks* 56 S.W.3d 513, 522 (Tenn. Ct. App. 2001).

In Indiana one needs to know which "specific act" caused his injury: *Van Dusen v. Stotts* 712 N.E.2d 491, 499 (Ind. 1999). Maryland requires knowledge of a duty breached: *Young v. Medlantic Laboratory Partnership* 725 A.2d 572, 575-576 (Md.App.1999).

Washington State requires discovery of all the elements of a cause of action. See *Ohler v. Tacoma General Hospital* 598 P.2d 1358, 1360 (Wash., 1979). Where the ostensible reason for an injury is present, plaintiff has no duty to seek out another explanation for that injury: "A plaintiff has no duty to seek out evidence of medical

negligence if another "facially logical explanation" for the injury exists." (Citation omitted). *Webb v. Neuroeducation Inc., P.C.* 88 P.3d 417, 420 (Wash. Ct. App. 2004).

In a Georgia radiation case, the patient had therapeutic radiation to his gonads and was told by his radiologist that radiation burns were a normal side effect and temporary, thus he delayed his investigation. The court found that this reassurance by his physician-defendant caused him to delay filing his lawsuit and that the statute would only begin to run when he realized he had suffered a tort. *Stephen W. Brown Radiology Associates v. Gowers* 278 S.E.2d 653, 773-774 (Ga. Ct. App. 1981).

In Connecticut one must discover 'actionable harm', which are the essential elements of a cause of action, before the statute of limitations begins to run: *Lagassey v. State 846 A.2d 831, 846-848 (Conn. 2004.)*

The North Dakota Supreme Court, citing the Utah Appellate case of *Deschamps v. Pulley,* 784 P.2d 471, 473 (Utah Ct.App.1989), requires knowledge of cause in fact: *Schanilec v. Grand Forks Clinic, Ltd.,* 599 N.W.2d 253, 255 (N.D.1999). (See also *Hoffner v. Johnson,* 660 N.W.2d 909, 914 (N.D.,2003)).

The Mississippi Supreme Court addresses this issue in a latent injury case:

> ...in the medical malpractice context, the discovery rule may apply in cases where the injury is not latent at all, but where the negligence which caused the known injury is unknown. *For instance, a patient who undergoes a medical procedure may develop serious complications which are clearly known. However, if the patient has no reason to know that the doctor's negligence in performing the procedure caused the complications, the discovery rule will apply, even though the injury itself is not latent at all.*

Sutherland v. Estate of Ritter 959 So.2d 1004, 1008-09 (Miss. 2007), (emphasis added).

Finally, in an Illinois radiation case, the court reasoned that a patient with adverse reactions to radiation might perceive those injuries as risks of radiation and not necessarily expect malpractice. *Hill v. Pedapati,* 759 N.E.2d 1015, 1018 (Ill. App. Ct. 2001).

Established Utah law does not abandon the cause-in-fact requirement. Additionally, federal court construction of the applicable section of the FTCA in a medical malpractice context and case law in other jurisdictions which have discovery statutes similar to Utah's medical malpractice discovery statue, require that plaintiff discover the cause in fact of his injuries before the statue of limitations begins to run.

A corollary to issue number one above is that if this Court determines that it is not necessary for a plaintiff to have discovered the cause-in-fact prior to the running of the statute of limitations, Mr. Daniels should have been allowed to instruct the jury that the statute is tolled if they found that the radiation oncology physicians from the U of U (Drs. Watson & Patton) misrepresented the cause of his anterior abdominal injuries.[25]

This would have been plain error (See *Moore v. Smith* 2007 UT App. 101, ¶16, 158 P.3d 562, 569). As set forth in *Jensen v. IHC Hospitals, Inc.* 2003 UT 51, ¶74, 82 P.3d 1076, 1092-93, involving a medical malpractice action, "merely because a statute incorporates a discovery rule does not mean that the common law fraudulent concealment exception also cannot be invoked."

Although usually applied where defendants are responsible for concealment or

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[25] Brief in support of proposed special verdict, R. 5794-5806, paragraphs 3 and 4.

omission (where a duty to disclose exists), in this case if Mr. Daniels suspected that his anterior abdominal injuries may have been caused by the University's EXBRT, then the jury should have been instructed to determine whether testimony of agents of the U of U (Drs. Watson and Patton) that his anterior abdominal injuries were caused by infection, or not by radiation, (Drs. Watson and Dr. Patton, respectively, at R. 6266 345:12-20 and 6266 405: 21-23) constituted fraudulent concealment, tolling the statute of limitations. (See also *Frito-Lay v. Labor Com'n* 2008 UT App 314 ¶ 22, 193 P.3d 665, 672-73; *Russell/Packard Development, Inc. v. Carson* 2003 UT App 316 ¶ 15, 78 P.3d 616, 621-25 and *Chapman v. Primary Children's Hosp.* 784 P.2d 1181, 1184 (Utah 1989).

2. The trial court abused its discretion when it admitted evidence that Mr. Daniels originally sued previously dismissed co-defendants, U of U and SLR.

Despite the fact that the Second Amended Complaint (R. 5476-85) ultimately governed the trial in this case, over objection the trial court admitted evidence that Mr. Daniels originally sued the U of U and SLR. The trial court allowed defense counsel to read to the jury portions of the original, unverified complaint related to the University's treatment. This was prejudicial under Section 403 in that it would confuse the jury. [26]

Utah Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially *outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,* or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
> (Emphasis added.)

[26] R. 6264 p. 2:18 to p. 3:7; p. 66:4-7; p. 67:5 to p. 72:23; R. 6265 p. 139:11 to p. 143:6 R. 6266 p. 243:20 to p. 248:25.

The issue of admissibility of this evidence is so entwined with the first issue on appeal—whether knowing which of multiple procedures may have been negligent is necessary before the statute of limitations is triggered, which is a question of law—that the issue is more properly reviewed under the correction of error standard. Specifically, the trial court incorrectly concluded that Mr. Daniels did not need to know that the procedure done by GWB and Dr. Hayes (the HDRB) was a cause-in-fact of his injuries.

This purely legal question of when the statute of limitations is triggered under the discovery rule outweighs the typically discretionary nature of the trial court's admission of evidence; the trial court's ruling was predicated on a misinterpretation of governing case law and was thus both an abuse of discretion and incorrect as a matter of law.

> Although the universe of questions presented for review has often been characterized as consisting only of mutually exclusive questions of fact or law, there is really a third category-the application of law to fact or, stated more fully, the determination of whether a given set of facts comes within the reach of a given rule of law.

State v. Pena, 869 P.2d 932, 936 (Utah 1994).

The trial court should not have allowed evidence that Mr. Daniels had originally sued other parties. Although the evidence was offered to impeach Mr. Daniels, it was more prejudicial than probative, especially since Mr. Daniels did not draft, or verify the original complaint. Admitting such evidence made it more probable than not that the jury would be confused and misled; neither of the dismissed parties were defendants in the suit before the jury in the statue of limitations trial against GWB and Dr. Hayes.

The standard of review for evidentiary rulings is an abuse of discretion. *Pena supra.*, at page 938. Arguably, the admission of the original complaint and allegations

therein having to do with the U of U and SLR, necessarily include a determination of legal issues encompassing the first issue on appeal, i.e. whether the mere suspicion of negligence of *any* procedure where there are two or more discrete medical procedures is sufficient to constitute 'discovery' or, whether a separate statute of limitations can be applied for each potential defendant, arising upon discovery of a possible relationship between the plaintiff/patient's injuries and the putative defendant's procedure.

Clearly, juror confusion was more probable than not given the vague special verdict and instructions, with no specific reference to the HDRB procedure used by GWB and Dr. Hayes. Furthermore, despite the limiting instruction that the sections read from the original complaint were to be considered by the jury only for impeachment, the trial court's admission of Mr. Daniels having filed suit against these dismissed defendants, along with defense counsel reading portions of that original, unverified, non-operative complaint, was certainly more prejudicial than probative.

3. The trial court incorrectly excluded evidence of insurance that showed the bias of key witnesses. The trial court should have also allowed questions regarding insurance in order to probe potential jurors' bias.

Insurance questioning in voir dire and impeachment of Drs. Mintz (and Allen once it was clear he changed his statement regarding whether he told Mr. Daniels that radiation was a cause of his anterior abdominal wounds in March, 2001) should have been allowed. Neither types of questions were offered to prove negligence as is prohibited by Utah Rule of Evidence 411; rather both were offered to show bias.

Dr. Mintz and Dr. Allen were both insured by UMIA, the same carrier as Dr. Hayes, and GWB.[27] Both these treating physician witnesses directly contradicted their deposition testimony or pretrial statements regarding the key fact of *whether* or *when* they told Mr. Daniels' radiation was a cause of his anterior abdominal wound breakdown. This inconsistent testimony was offered by both treating doctors without explanation (R. 6266 p. 326:26 to p. 328:11; R. 6265 p. 202:23 to p. 207:4, p. 231:12 to p. 215:15).

This Court recently addressed probing bias during voir dire in *Alcazar v. University of Utah Hospitals & Clinics* 2008 UT App 222, 188 P.3d 490. In *Alcazar*, the plaintiff was not allowed to ask potential jurors about "attitudes toward medical malpractice cases, insurance rates, or tort reform." *Id.* at ¶18. This failure to allow questioning about potential jurors' biases "left plaintiffs counsel without the necessary information needed to ferret out a potential juror's actual bias or to intelligently exercise preemptory challenges [.]" *Id.* at ¶18.

Similarly, Mr. Daniels should have been allowed to inquire of the venire panel on whether any of the prospective jurors have ever worked in, or whether any of their family or friends has worked in the insurance claims industry or risk management. Mr. Daniels was prejudiced because he was unable to test prospective jurors' potential bias and unable to "intelligently exercise preemptory challenges" Id. at ¶18.

In addition, Mr. Daniels should have been able to ask Dr. Mintz, Dr. Allen (and Dr. Watson) if they were insured by UMIA. Mr. Daniels learned in deposition that Dr. Mintz is insured by UMIA (R. 5861). Because Dr. Mintz et. al., and defendants were

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[27] R. 5860-64. Upon information and belief, Dr. Allen is also insured by UMIA.

insured by the same carrier and since Dr. Mintz changed his deposition testimony during trial, Mr. Daniels should have been allowed to question Dr. Mintz regarding UMIA; but the trial court denied this request (R. 6264 p. 22:19 to p. 30:2; R. 5860-64; & 6022).

At trial Dr. Mintz changed his sworn deposition testimony given almost a year earlier to the effect that he had not told Mr. Daniels that radiation was the cause of his abdominal injuries until many months after the initial breakdown in March of 2001 which began to heal and then started to break down again in late May of 2001. Instead at trial he changed his testimony and said that he told Mr. Daniels in March, 2001 that radiation was a cause of his initial abdominal wound breakdown (R. 6265 p. 202:23 to p. 205:25).

Dr. Allen also testified that he changed what he told counsel in a conversation prior to the trial. In trial he testified that he told Mr. Daniels in March, 2001, that radiation had caused his injuries, although he admitted he said something different to Mr. Daniels' attorney prior to the statute of limitations trial (R. 6266 p. 326:26 to p. 328:11).

Despite attempts to refresh their recollection, both physicians made key changes to their testimony. At this point Mr. Daniels' attorney should have been allowed to ask as impeachment whether each of them were insured by UMIA. Utah Rule of Evidence 411 states that evidence of insurance, if offered to prove bias or control, is admissible. Because these physicians changed their prior statements, there is a strong inference of bias towards, and possibly control by, the carrier they share with GWB and Dr. Hayes.[28]

[28] UMIA is a physician-owned organization. Its profits are directly related to the amount of claims paid (or denied). See www.UMIA.com/history.html.

4. The trial court erred as a matter of law in granting partial summary judgment' on the issue of punitive damages.

Mr. Daniels submitted substantial evidence showing the existence of genuine issues of material fact as to whether GWB's and Dr. Hayes' "conduct manifested a knowing and reckless indifference toward, and a disregard of [Mr. Daniels]' rights [and safety]." Utah Code Ann. § 78B-8-201(1)(a). Such conduct is expressly, per Utah statute and subsequent case law interpretation of that statute, a basis for allowing punitive damages. Partial summary judgment on Mr. Daniels claim for punitive damages should not have been granted where such a genuine issue of fact exists.

The trial court found that Mr. Daniels had pleaded facts sufficient to proceed with a cause of action for gross negligence, but claimed those facts were insufficient to allow a claim for punitive damages to go to the jury. The trial court granted partial summary judgment on the claim for punitive damages, reasoning that the conduct of GWB and/or Dr. Hayes had to be *willful* or *knowing*; this is incorrect as a matter of law (R. 5438-41).

Mr. Daniels need only show that there exists a genuine issue of material fact as to whether the conduct of GWB/Dr. Hayes was intentionally and knowingly *reckless* in disregarding Mr. Daniels' rights. Mr. Daniels does not have to show that the defendants intentionally or knowingly caused him harm.

In *Smith v. Fairfax Realty, Inc.,* 82 P.3d 1064 (Utah 2003), the Utah Supreme Court addressed the issue of submitting the matter of punitive damages to the jury. The Supreme Court found "...more than sufficient evidence to support the court's submission

of the punitive damages question to the jury. Price's actions display an intentional disregard of the Smiths' rights and of its fiduciary obligations." *Id.*, at p. 1070.

"While simple negligence will not support punitive damages, *negligence manifesting a knowing and reckless indifference toward the rights of others will.* A determination must be made on the facts of each case whether the negligence complained of is of the sort that will support punitive damages." *Diversified Holdings, L.C. v. Turner* UT 2002 129, ¶29; 63 P.3d 686, 699 (Utah, 2002) (emphasis added).

The trial court's finding that plaintiff had pleaded facts sufficient to maintain a cause of action for gross negligence based upon "[the] reckless indifference to the rights of others" supports a finding that Mr. Daniels had raised a genuine issue of material fact regarding punitive damages and therefore the prior grant of partial summary judgment dismissing Mr. Daniels' claim for punitive damages was improper.

There is a genuine issue of material fact as to whether Dr. Hayes' failure to apprise Mr. Daniels about the risks of HDRB (when it was known that Mr. Daniels was to also receive EXBRT) together with administration of the HDRB in an experimental manner, constituted a knowing and reckless indifference, and disregard of Mr. Daniels' rights.

GWB nurse Melinda Forbush testified that in 2001 the documents regarding risks of radiation (patient education sheets) were kept in a drawer behind the front desk in the GWB waiting room and not given to a patient unless that patient specifically asked (R. 6400 line 18 through R. 6412). Furthermore, although she claimed in 2001 patients signed a consent form setting forth the risks of radiation; (R. 6408:14-19 & R. 6410:1-5), clearly Mr. Daniels was not given such a document (R. 6355). None of the informed

consent documents signed by Mr. Daniels for the HDRB set forth any specific information about radiation burns or other injuries which could result from the HDRB (R. 6477-80). Mr. Daniels wasn't informed of any of these risks (R. 6353-55).

It is undisputed that neither Dr. Hayes (nor anyone on behalf of GWB) informed Mr. Daniels that Dr. Hayes had performed brachytherapy (HDRB) of the pelvic sidewall after excision of a colorectal tumor less than ten times (if ever), that this was an experimental procedure, or that there were other proven and safer options for treatment of his rectal tumor (R. 6487-90).

Mr. Daniels' was not told about alternative treatments, the risks of brachytherapy, Dr. Hayes' and Dr. Hansen's inexperience with HDRB in anything but prostrate or breast tumors, or the fact that this was a novel application of brachytherapy (R. 6354-55 & 1571). Dr. Hayes admitted that he relayed no such information to Mr. Daniels (R. 6467, 6472-73). Dr. Hansen "[doesn't] recall specifics of the conversation" (R. 1580). What is clear is that nobody informed Mr. Daniels that the application of HDRB immediately after excision of his tumor was an experimental approach to dealing with any residual pelvic disease, or that these defendants had rarely (if ever) performed this approach.

In fact Dr. Hansen, in his pre-operative note originally planned to give Mr. Daniels pre-operative EXBRT in order to shrink the tumor "<u>if unresectable, plan pre-op RT</u>"; however later it appears he changed his mind and decided to try something new (R. 6350-51 & 6466-67). Dr. Mintz, a colleague practicing in the same building as GWB, admits they were trying something "a little bit out of the ordinary" (R. 6363).

Gwen Myron, the radiation physicist who had been working for GWB for several months prior to Mr. Daniels' treatment had never done this type of application before Mr. Daniels' procedure (R. 1586-87).

Dr. Patton had previously worked with Dr. Hayes in the U of U Radiation Oncology Department. This was prior to Dr. Hayes opening up GWB in 1999. Although Dr. Patton accepted referrals back and forth from Dr. Hayes from the time Hayes left the University to begin his own business, through June of 2001 when Dr. Patton moved to Oregon, Mr. Daniels was the first and only colorectal tumor case referred between the two physicians. The rest of the referrals were prostate cancer. Dr. Patton also testified in deposition that he would not have used HDRB in the manner used by defendants after surgical excision of the tumor, and that he has had good results with advanced colorectal tumors by using *pre-operative* therapeutic radiation (R. 6320-24* it appears that page 64 was inadvertently unnumbered). Dr. Patton had never seen HDRB used on the residual margins of a partially excised colorectal tumor before.

Dr. Hansen had never performed HDRB before on a rectal tumor, and Dr. Hayes was unable to state when or where or with whom (he admitted it requires two radiation oncologists to perform the procedure) he had performed HDRB to the residual margins of an excised colorectal tumor (R. 6470-71).

Dr. Peter Bossart, Mr. Daniels' treating colorectal surgeon, who tried to repair the damage done by the excess radiation, testified in deposition that he had never used and had never seen brachytherapy used for such a tumor. Instead, Dr. Bossart had experienced good results with the standard preoperative EXBRT (R. 6445).

Dr. Richard W. Schwartz, Defendants' expert surgeon, testified that he has excised 100-200 colorectal tumors, and in none of those had he used brachytherapy for residual pelvic disease (R. 6448-49). Instead EXBRT is generally used with the limit of 5,040 cGy because that is the tolerance for nearby normal tissue (R. 6451).

Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Lach v. Deseret Bank*, 746 P.2d 802, 804 (Utah 1987). Since summary judgment is a "harsh measure," all facts should be construed most favorably to the non-moving party. *Controlled Receivables, Inc. v. Harman,* 413 P.2d 807, 809 (Utah 1966).

Mr. Daniels presented ample issues of genuinely disputed facts as to whether GWB's/ Dr. Hayes' conduct manifested a knowing and reckless indifference toward and a disregard of Mr. Daniels' right to be fully informed of the risks of such a high dose of radiation, alternative treatments, or experimental nature of the HDRB procedure, thereby depriving him of his right to determine what would be done with his body.

> The relationship between a doctor and his patient creates a duty in the physician to disclose to his patient any material information concerning the patient's physical condition. This duty to inform stems from the fiduciary nature of the relationship *and the patient's right to determine what shall or shall not be done with his body. ..*
>
> The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity. The scope of the duty is defined by the materiality of the information in the decisional process of an ordinary individual. If a reasonable person in the position of the Plaintiff would consider the information important in choosing a course of treatment then the information is material and disclosure required.

Nixdorf v. Hicken 612 P.2d 348, 354 (Utah 1980). [Emphasis added]

Additionally the trial court struck certain exhibits which Plaintiff had submitted in opposition to defendants' motion for partial summary judgment, to wit: 4, 6, 8, 11, 12, 14, 17, & 19 (R. 5069). Utah Rules of Civil Procedure 12 (f) states:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any *insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.* Utah R. Civ. P.12(f), emphasis added).

Since none of these exhibits fit the characterization of "...insufficient defense, redundant, immaterial, impertinent or scandalous matter", they should not have been stricken.

5. Utah Rules of Civil Procedure 30(e) and 26(1)(e) expressly allow changes to a witness's deposition and require supplementation of expert opinions obtained in deposition. The trial court incorrectly excluded plaintiff's key expert radiation oncology witness, Dr. Sydney P. Kadish's, supplemental opinions.

The trial court granted a motion to strike changes to Dr. Kadish's deposition and opinions disclosed in a Rule 26(1)(e) supplement. Dr. Kadish should be allowed to supplement his deposition testimony where the parties stipulated that no expert reports would be exchanged, defense counsel did not specifically ask Dr. Kadish's opinion on 'substantial and significant risk', and Dr. Kadish's additional testimony was offered via timely changes to his transcript and a supplementary Rule 26(1)(e) disclosure.

This Court should rule on the admissibility of these supplemental opinions, some of which are merely foundational,[29] since this ruling would guide the trial court should Mr. Daniels prevail on appeal and be allowed to proceed to trial on the merits. Such a ruling is not merely advisory because it would provide the trial court guidance and have a meaningful effect on the testimony allowed by Dr. Kadish on remand. See e.g. *Houghton v. Department of Health* 2005 UT 63, ¶12, 125 P.3d 860 (stating "An opinion is not merely advisory, however, if it will, in fact, have a "meaningful effect" on the parties.") (Quoting *Provo City Corp. v. Thompson,* 2004 UT 14, ¶ 22, 86 P.3d 735).[30]

Dr. Kadish was first deposed on May 26, 2006. During that deposition it became apparent that he had not received or reviewed at least two deposition transcripts and a preoperative CT scan of the *pelvis*, which scan would have shown the tumor. The preoperative CT included an *abdominal* and a *pelvic* CT; however, the CT was missing for years (R. 3576, p. 29:5 to p. 30:4).

It was only after depositions of two record custodians and many demands that the *abdominal* CT was located at *GWB* (R. 4722-45). Plaintiff was given the *abdominal* CT with no explanation and led to believe that was all there was. Mr. Daniels, in his

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[29] For example, the supplemental opinion disclosed per Rule 26(1)(e), that the HDRB posed a substantial and significant risk to Mr. Daniels.

[30] See also *State v. Low* --- P.3d ---, 2008 WL 3876126 (Utah), 2008 UT 58 ¶61: "Although we reverse Low's conviction and remand the case for retrial based on the district court's erroneous inclusion of the extreme emotional distress manslaughter instruction, there are other issues presented on appeal that will likely arise during retrial. We therefore exercise our discretion to address those issues for purposes of providing guidance on remand. See *State v. James,* 819 P.2d 781, 795 (Utah 1991) ("Issues that are fully briefed on appeal and are likely to be presented on remand should be addressed by this court.")

frustration, seeing that the preoperative CT produced by GWB had only the *abdominal* and not the *pelvic* portion, (despite the fact that defense expert, Dr. Nissar Syed admitted to having reviewed the *pelvic* CT prior to his deposition in October, 2006, (R. 4723 & 4731-32) subpoenaed counsel for GWB for the pelvic CT (R. 4722-45 & 4716-19). Defense counsel moved to quash the subpoena. In the interim SLR 'reconstructed' the pelvic CT on or about March 21, 2007; the original was never located (R. 4870). As such, Dr. Kadish should be able to opine on this reconstructed diagnostic film at trial.

On September 18, 2006 Dr. Kadish gave a second deposition. In deposition, Mr. Daniels' counsel objected to the overly broad question posed by counsel for GWB and Dr. Hayes of whether Dr. Kadish had given all his opinions.[31] Dr. Kadish reviewed his first deposition along with several other deposition transcripts which had originally not been reviewed by him. Dr. Kadish made changes to his September 18, deposition. Dr. Kadish' transcript of the 18th was sent out with an undated cover sheet. As set forth in the affidavit of Alicia Blunt, Merit Reporters purposely doesn't date their cover sheet which accompanies the reading transcript (R. 3483-85).

Rule 30 allows a deponent 30 days *after being notified by the officer that the transcript of recording is available* in which to review and make corrections to their transcript. Utah R. Civ. P. 30. Dr. Kadish lives and works in Massachusetts. He had 30 days, *plus three* from the date he *receives* his copy for review, to make changes. Utah R. Civ. Proc. 6(e). Per Ms. Bunt's affidavit the transcript was mailed September 20, 2006,

[31] (R. 3565, p. 15:15 to p. 16:25).

add thirty days (Ms. Blunt says Merit gives a witness forty-five days) plus three for mailing, and the changes faxed October 20th, and 23rd respectively, were timely.

A deposition is part of the discovery process. The purpose of a deposition is to discover the opposing expert's testimony, not to preempt legitimate opinions by legalistic maneuverings that do not comport with the spirit of the law. The onus is on the party asking questions to elicit the necessary opinions. If the questioner asks the expert to merely state his opinions, but does not inquire as to the basis or foundation for those opinions, it seems unfair to circumscribe the expert's testimony at trial. This is especially the case, where, as here, the opposing party has notice of those foundational opinions well in advance of trial and before their experts' depositions.

All counsel agreed to waive reports in the initial discovery order. Since that time, defendants have argued that if an opinion is not specifically set forth in deposition, then it can't be presented at trial. However, it is argued that an agreement to waive reports does not waive the right to supplement deposition testimony where necessary.

Furthermore, Rule 26 specifically requires counsel to supplement his experts' opinions as given in deposition:

> e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a) (3)(B) *the duty extends both to information contained in the report and to information provided through a deposition of the expert.* [Emphasis added]

This Court has previously held that "once an expert renders an opinion [he] must be allowed to explain the foundation for that opinion." *Green v. Louder* 2001 UT 62 ¶ 29,

29 P.3d 638, 646. Because the expert in Green "was not allowed to fully explain the basis of his opinion[,] the court's exclusion of that testimony was in error". *Id.*

Thus the foundational opinions set forth in plaintiff's Supplemental Rule 26 Disclosures (R. 2303-09), by Dr. Kadish, that administration of the HDRB caused a substantial and significant risk of injury to Mr. Daniels, should be allowed to be given on retrial of this case, should this Court order remand. This opinion was a foundational opinion to the opinion stated in Dr. Kadish's original deposition re: informed consent.

Additionally, because this new information (the reconstructed *pelvic* CT film) was created long *after* Dr. Kadish was deposed, Dr. Kadish should not be prevented from commenting on the preoperative pelvic CT prior to trial.

6. Utah recognizes a cause of action for breach of fiduciary duty in the context of a physician-patient relationship; therefore the Court should reinstate this cause of action in Mr. Daniels' Second Amended Complaint.

The common law cause of action for breach of fiduciary duty has been recognized in the physician-patent context in Utah. *Nixdorf v. Hicken* 612 P.2d 348, 354-55 (Utah 1980). This Court has characterized the duties of a fiduciary in a joint venture and general to limited partner context as requiring: loyalty, trust, disclosure, the utmost good faith, fairness and honesty. See *Lynch v. MacDonald,* 367 P.2d 464, 468 (Utah 1962) and *Smith v. Fairfax Realty, Inc.,* 2003 UT 41 ¶ 43, 82 P.3d 1064, 1074.

In the attorney-client context punitive damages have been held to be appropriate in breach of fiduciary cases (presumably where the other requirements for the application of punitive damages are met).

> ....in Utah, a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty, and can serve as the basis for punitive damages. (Citations omitted). Therefore, even though punitive damages were inappropriately pleaded as an independent cause of action, because the claim for breach of fiduciary duty is reinstated, punitive damages can be awarded as a remedy based upon this claim.

Norman v. Arnold, 2002 UT 81 ¶ 35, 57 P.3d 997, 1006.

The facts in this case show that defendants' treatment was administered in bad faith and without full disclosure and that their loyalty was to Dr. Mintz, their colleague, and to trying new applications of brachytherapy, instead of to their patient Mr. Daniels. The scope of the breach of the duty of full disclosure is broader than that required by Utah's informed consent statute under the Medical Malpractice Act. It is a defense to a claim for lack of informed consent under this statute if the following is shown:

> ...the health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition;

Utah Code Ann. § 78-14-5(2)(d) © 2001; currently Utah Code Ann. § 78B-3-406.

Significantly, the defense set forth in subpart (d) above, is quite paternalistic in nature and seems at odds with the holding in *Nixdorf v. Hicken* 612 P.2d 348, *supra.*, that a patient is the one to determine what is to be done with his body. This defense is so vague that it could be argued to apply in a number of situations where "doctor knows best" is claimed.

Other jurisdictions have recognized a separate cause of action for breach of fiduciary duty in the medical malpractice context. A California District Court reasoned:

> The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs.

Canterbury v. Spence, 464 F.2d 772, 789 (C.A.D.C., 1972).

The Supreme Court of California has held that a physician has a fiduciary relationship with his patient and that a patient can state a cause of action for breach of a physician's fiduciary duty to disclose facts material to the patient's consent. *Moore v. Regents of the University of California,* 793 P.2d 479, (1990).

The Nevada Supreme Court recognized a cause of action for breach of fiduciary duty in the context of a psychiatrist' sexual relationship with a vulnerable patient. The Court stressed that "the physician is obligated to exercise [the] utmost good faith". *Hoopes v. Hammargren* 725 P.2d 238, 431 (Nev. 1986).

The common law cause of action for breach of fiduciary duty, if applied in the physician-patient context as it has been applied in the attorney-client and accountant-client context would seem to override this defense. Suits against such other professionals often entail causes of action for both negligence and breach of fiduciary duty.

The scope of the duty of full disclosure is not limited to information regarding plaintiff's physical condition. "The scope of the duty is defined by the materiality of the information in the decisional process of an ordinary individual. If a reasonable person in the position of the plaintiff would consider the information important in choosing a course of treatment then the information is material and disclosure required." *Nixdorf v. Hicken* 612 P.2d 348, 354 (Utah, 1980).

In describing the legal duty of a developer-builder to a buyer, this Court reasoned:

> Age, knowledge, influence, bargaining power, sophistication, and cognitive ability are but the more prominent among a multitude of life circumstances that a court may consider in analyzing whether a legal duty is owed by one party to another. Where a disparity in one or more of these circumstances distorts the balance between the parties in a relationship to the degree that one party is exposed to unreasonable risk, the law may intervene by creating a duty on the advantaged party to conduct itself in a manner that does not reward exploitation of its advantage.

Yazd v. Woodside Homes 2006 UT 47 ¶16, 143 P.3d 283, 286.

Certainly a physician's duty to his patient would at least rise to the level of a developer-builder of real estate to a potential buyer in disclosing information material to the purchase. Therefore, in line with a fiduciary's duty of loyalty, the procedure preformed should be selected based upon what is best for the patient in consultation with the patient, and not selected because a colleague recommends and/or the physician wants to try something new. A cause of action for breach of fiduciary duty is broader than the statutory cause of action for lack of informed consent and therefore not duplicative.

7. The trial court erred as a matter of law when it denied Mr. Daniels' leave to amend to add a cause of action for fraudulent concealment.

Utah recognizes a cause of action for fraudulent omission to state material facts in the physician-patent context: "When the physician has knowledge of a fact concerning the patient's physical condition which is material to the patient, this fiduciary relationship may render the physician's silence fraudulent." (Citation omitted). *Nixdorf v. Hicken* 612 P.2d 348, 355 (Utah 1980).

> In order to prevail on a claim of fraudulent concealment, a plaintiff must prove "(1) that the nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that

there is a legal duty to communicate."(Citation omitted). These elements are presented in inverse order of importance.

Yazd v. Woodside Homes Corp. 2006 UT 47, ¶10, 143 P.3d 283, 285.

Mr. Daniels discovered evidence which supports all three elements of this cause of action. Specifically, the legal duty arises as a result of the fiduciary relationship between Mr. Daniels and GWB, which arose once Dr. Hansen proceeded to recommend treatment. Dr. Hansen knew and in fact planned pre-operative RT, this information was not disclosed to Plaintiff and had it been, arguably, he would have chosen the proven therapy instead of an unknown and experimental type.

It has long been held that an amended complaint is not barred by the applicable statute of limitations where the amendment merely expands on plaintiff's negligence theories: "in a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured or as to the manner of the defendant's breach of duty". *Peterson v. Union Pac. R.R. Co.,* 8 P.2d 627, 630-31 (Utah 1932).

Other jurisdictions have allowed such a cause of action. In *Estate of Leach v. Shapiro,* 469 N.E. 2d 1047, 1054 (Ohio App., 1984) the Ohio Court of Appeals, citing the "disparity in expertise" between a physician and patient held that "A physician's non-disclosure may give rise to an action in fraud independent of malpractice." *Id.* at p.1054.

> We hold that where, as here, a physician knowingly and intentionally represents that he can administer safely a substance that, in fact, can be administered only under restrictions and controls of state or federal authority, and he administers that substance without the requisite permit and without informing the patient of the restrictions and dangers, the patient can maintain an action for fraud as well as malpractice. Under these circumstances, a physician, like any other fiduciary, is liable for his fraudulent conduct.

Nelson v. Gaunt 125 Cal. App. 3d. 623, 636 (Cal. Ap. 1st Dist., 1981).

RELIEF SOUGHT

WHEREFORE the Supreme Court of the State of Utah is respectfully requested to:

1. Reverse and remand for retrial (or permission to allow Mr. Daniels to bring a motion for summary judgment) on the statute of limitations issue, applying the correct standard for the discovery rule; and

2. In any retrial on the statute of limitations issue, direct the trial court to exclude any evidence that Mr. Daniels originally brought suit against either the U of U or SLR; and

3. In any retrial on the statute of limitations or the merits, allow counsel to introduce impeachment evidence that Drs. Mintz, Allen and Watson are insured by UMIA; and

4. Allow Mr. Daniels' claim for punitive damages as it relates to his cause of action for gross negligence [and breach of fiduciary duty and fraudulent concealment should the Court so allow as requested below] and allow the jury to determine this issue; and

5. Allow Dr. Kadish to testify regarding opinions as set forth in his deposition changes and to testify in accordance with his additional opinions set forth in specificity in Mr. Daniels' Supplemental Rule 26 Disclosures, and to address the preoperative pelvic CT only produced on March 21, 2007; and

6. Allow Mr. Daniels' cause of action for breach of fiduciary duty; and

7. Allow Mr. Daniels' cause of action for fraudulent concealment; and

8. Allow the claim for punitive damages to go to the jury for determination.

Dated: this 6th day of November, 2008

By: Kay Burningham
Attorney for Appellant, Ralph Daniels

CERTIFICATE OF SERVICE

I hereby certify that on November 7th, 2008, I caused to be hand delivered two true and correct copies of this brief and addendum to:

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